

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VICENTE REY Claimant)	
VS.)	
)	
)	Docket Nos. 180,492; 180,935;
)	183,718
MONFORT, INC.)	
Respondent)	
Self-Insured)	

ORDER

Both the respondent and the claimant requested the Appeals Board review of the Award entered by Administrative Law Judge Jon L. Frobish on May 15, 1996. The Appeals Board heard argument by telephone conference on November 5, 1996.

APPEARANCES

Claimant appeared by his attorney, Stanley R. Ausemus of Emporia, Kansas. Respondent, a self-insured, appeared by their attorney, Alisa A. Nickel, appearing for Terry J. Malone of Dodge City, Kansas. There were no other appearances.

RECORD

The Appeals Board considered the record contained in the Award.

STIPULATIONS

The Appeals Board considered the stipulations contained in the Award. The Award contains a stipulation that docket numbers 183,718 and 180,935 were dismissed. That stipulation is in error. A joint stipulation was filed of record on September 7, 1995, clarifying that docket numbers 180,492 and 180,935 were dismissed, leaving docket number 183,718 for decision. Additionally, the parties filed a stipulation before the Appeals Board on July 22, 1996, that showed the amount of time the claimant lost because he had to missed work for medical treatment for his injuries, permanent functional impairment and work restriction evaluations.

ISSUES

Respondent requested Appeals Board review of the following issues:

(1) Whether the claimant should be limited to an Award of only medical compensation as provided for in K.S.A. 1992 Supp. 44-501(c).

(2) Whether K.S.A. 44-501(c) as amended by K.S.A. 1996 Supp. 44-501(c) can be constitutionally applied retroactively as provided by K.S.A. 1996 Supp. 44-501a.

Claimant asked Appeals Board review of the following issue:

(3) Nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and hearing arguments of the parties, the Appeals Board finds as follows:

(1)(2) The regular hearing was held in this multiple docketed case on July 18, 1995. At that time, the parties agreed to dismiss docket numbers 180,492 and 180,935. The parties stipulated to a date of accident of April 1, 1993, in the remaining docket number of 183,718. Furthermore, all elements of the claim were agreed to by the parties except for the issues of nature and extent of disability, future medical expenses, and vocational rehabilitation.

Before an award was rendered by the Administrative Law Judge in this case, the Kansas Court of Appeals issued the decision in the case of Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198, rev. denied, 260 Kan. _____ (1996). The Court of Appeals held in Boucher that under the plain and unambiguous language of K.S.A. 44-501(c), an employer is liable only for medical expenses incurred by the injured employee

when such injury does not disable the employee for a period of at least one week. 21 Kan. App. 2d 977, Syl. ¶2.

As a result of the Boucher decision, the parties agreed to reopen the case for an extension of terminal dates in a hearing held before the Administrative Law Judge on March 12, 1996. However, the Kansas Legislature in S.B. 649 which became law upon its publication in the Kansas Register on April 4, 1996, amended K.S.A. 44-501(c) and struck the requirement that an employee had to be disabled from earning full wages at work for at least one week before the employer could be liable for other than medical compensation.

The Administrative Law Judge entered an Award in this case on May 15, 1996, without addressing the Boucher decision or the amendments to K.S.A. 44-501(c) made by the 1996 Legislature. From that Award, both the respondent and claimant have appealed.

Respondent argues the award should be limited to medical compensation because claimant's injuries did not disable him from earning full wages at work for one week. Respondent contends the provisions of K.S.A 1992 Supp. 44-501(c) which were in effect on the date of claimant's accident, April 1, 1993, and as interpreted by the Boucher case limits the employer's liability to only medical expenses. Accordingly, the respondent contends the Administrative Law Judge erred in awarding claimant permanent partial general disability benefits. Furthermore, respondent argues the provisions of K.S.A 1996 Supp. 44-501a which provide for the amendments to K.S.A 44-501(c) to be applied retroactively for an injury which occurred prior to April 4, 1996, and which the claim has not been fully adjudicated are unconstitutional. Respondent's basic argument is that the retroactive application of the amendment imposes a liability on the respondent that did not previously exist.

On the other hand, claimant argues that K.S.A. 1996 Supp. 44-501a is constitutional and can be applied retroactively because the intent of the Legislature was clearly expressed. Additionally, claimant asserts that K.S.A. 1992 Supp. 44-501(c) does not apply to the facts of this case because the joint stipulation filed before the Appeals Board on July 22, 1996, shows claimant was disabled from work at least one week without earning full wages because of his injury.

The Appeals Board has previously addressed the Boucher decision and the subsequent 1996 amendments to K.S.A 44-501(c) contained in S.B. 649 in the case of Redford v ANR Freight Systems, Docket No. 192,613 (Sept. 1996). In Redford the Appeals Board found K.S.A 44-501(c), as amended by S.B. 649, to be applicable to a claim for compensation with an accident date of March 1, 1994, and not fully adjudicated on the effective date of such amendments, April 4, 1996. The Appeals Board held K.S.A 1996 Supp. 44-501a could be applied retroactively as the constitutionality of a statute is presumed valid. The Appeals Board went on to hold that the constitutionality of the statute

would not be addressed by the Appeals Board because administrative agencies are generally not empowered to determine that issue.

The joint stipulation filed by the parties before the Appeals Board on July 22, 1996, shows claimant missed a total of six days and four hours of work without pay because of his work-related injuries. The Appeals Board finds five days of the total days claimant missed because of his injuries were related to either specific treatment of those injuries or diagnostic procedures ordered by claimant's treating physician. The Appeals Board finds the five days claimant missed work and lost wages removes claimant from the statutory provisions of K.S.A 1992 Supp. 44-501(c). Accordingly, the Appeals Board concludes the claimant is entitled to workers compensation benefits not limited to only medical expenses.

(3) The Administrative Law Judge limited claimant to permanent partial disability benefits based upon the permanent functional impairment rating of independent medical examiner's, Blake C. Veenis, M.D., opinion of 11 percent. Claimant asserts he is eligible for a much larger work disability award. Claimant alleges he presented evidence that overcame the no work disability presumption contained in K.S.A. 1992 Supp. 44-510e(a) that arises when an injured worker is earning an average weekly wage post-injury comparable to his pre-injury average weekly wage. In the instant case, the parties stipulated that claimant's pre-injury average weekly wage amounted to \$286.02 and his post-injury average weekly wage had increased to \$376.82.

Claimant claimed permanent injuries to his left shoulder, low back, and right hand as a result of repetitive activities he had to perform at work. Respondent provided claimant with conservative medical treatment from Lauren A. Welch, M.D. and then C. Reiff Brown, M.D., an orthopedic surgeon. Claimant was also seen at his attorney's request by Aly M. Mohsen, M.D., a specialist in physical medicine and rehabilitation, on March 17, 1994. Because the parties could not agree upon a functional impairment rating, the Administrative Law Judge ordered an independent medical examination by Blake C. Veenis, M.D., board certified in physical medicine, who examined the claimant on January 4, 1995. Dr. Brown, Dr. Mohsen, and Dr. Veenis all assigned claimant a functional impairment rating and imposed permanent restrictions resulting from claimant's work-related injuries. Two vocational experts also testified in this case, Karen Crist Terrill on behalf of the respondent and Donald E. Vander Vegt on behalf of claimant.

Respondent presented the testimony of claimant's supervisor, Mary Hinson, in regard to respondent's effort to retain the claimant in its employment at a comparable wage. Ms. Hinson conceded that due to the claimant's permanent work restrictions he could not return to the rib sawing job he was performing at the time of his injury. However, Ms. Hinson testified respondent had moved claimant to lighter jobs that he was able to perform within his permanent work restrictions. At the time of Ms. Hinson's deposition, claimant was performing the job of building combos, earning a wage that exceeded his pre-injury wage, and the job was within his permanent restrictions. Additionally, the building combo job was a regular production job, not temporary or a job made only to accommodate

claimant's restrictions. Claimant did testify at the regular hearing that his shoulder and back remain symptomatic. Nevertheless, he also testified that he had not missed work because of the continuing symptoms.

The Appeals Board is cognizant of the fact that both vocational experts testified and expressed their opinions that due to claimant's permanent restrictions he had lost a portion of his ability to perform work in the open labor market. Claimant takes the position that this testimony overcomes the no work disability presumption and makes claimant eligible for an award based on work disability. The Appeals Board disagrees with claimant's analysis.

The Appeals Board finds, when the evidentiary record is considered as a whole, claimant has not presented persuasive evidence that overcomes the no work disability presumption. The Appeals Board concludes the greater weight of the evidence contained in the record established the respondent has made a successful effort to place this injured claimant in a permanent necessary production job, where he can perform the job requirements within his permanent work restrictions, earning a comparable wage.

The Appeals Board also is mindful claimant testified he remains symptomatic from his injuries but those symptoms have not been severe enough to have caused him to terminate working. Furthermore, the Appeals Board finds the facts of this case are clearly distinguishable from the facts of the case cited by claimant where the Kansas Court of Appeals held the no work disability presumption was overcome by vocational expert testimony. Locks v. Boeing Co. 19 Kan. App. 2d 17, 864 P.2d 738, rev. denied 253 Kan. 859 (1993). In the Locks case, the worker was assigned a post-injury job which was temporary in nature and the worker's disability was an ongoing progressive health problem making her employment opportunity only momentary. In contrast, the claimant's post-injury job was a permanent production job and there is absolutely no evidence that claimant's disability is progressive. The presumption of no work disability was designed to help prevent an injured worker from earning substantial post-injury wages while collecting workers disability benefits. See Lee v. Boeing Co., 21 Kan. App. 2d 365, 371, 899 P.2d 516 (1995). Therefore, the Appeals Board finds the Award of the Administrative Law Judge limiting claimant's entitlement to permanent partial general disability benefits based on an 11 percent permanent functional impairment rating is appropriate and affirms the Award.

All other Orders of the Administrative Law Judge are adopted by the Appeals Board as if specifically set forth in this Order.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge Jon L. Frobish dated May 15, 1996, should be, and is hereby affirmed in all respects.

All remaining Orders contained in the Award are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of February 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Emporia, KS
Terry J. Malone, Dodge City, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director